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**IN THE  
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF K.P., A Child In Need  
of Services

MICHAEL BENNETT

Appellant-Respondent,

VS.

MARION COUNTY DEPARTMENT OF  
CHILD SERVICES

Appellee-Petitioner

and

CHILD ADVOCATES, INC.

Co-Appellee/Guardian ad Litem.

[illegible]

No. 49A02-0610-JV-861

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Christopher Piazza, Magistrate  
Cause No. 49D09-0603-JC-011798

**May 10, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Judge**

Michael Bennett (“Father”) appeals the trial court’s determination that K.P. is a child in need of services (“CHINS”). Father raises one issue, which we restate as whether the evidence is sufficient to support the trial court’s finding that K.P. is a CHINS. We affirm.

The facts most favorable to the trial court’s order follow. Father and Jessica Phalen (“Mother”) have a daughter, K.P., who was born on November 10, 2005.<sup>1</sup> K.P. was born with marijuana in her system and the Marion County Department of Child Services (“MCDSCS”) became involved. At that time, Father had not established paternity. Under a service referral agreement, Mother agreed to complete home based counseling, drug and alcohol assessment, drug screens, and follow through with any other recommendations of the service provider. K.P. was in Mother’s care during this time. Mother never completed the drug and alcohol assessment and did not complete the services. Father was never present during the case manager’s visits.

The case manager received a report regarding the family that caused her to do an investigation during the pendency of the service referral agreement, and she called

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<sup>1</sup> Mother does not appeal the CHINS determination.

Mother. Mother met with the case manager and informed her that she had used cocaine the night before with Father.

On March 21, 2006, the DCS filed a petition alleging that K.P. was a CHINS. The petition alleged:

5. The children are Children In Need of Services as defined in IC 31-34-1 in that: one or more of the children's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of a parent, guardian or custodian to supply one or more of the children with necessary food, clothing, shelter, medical care, education or supervision; and the children need care, treatment or rehabilitation that the children are not receiving and are unlikely to be provided or accepted without the coercive intervention of the Court, as shown by the following, to wit:
  - A) On or about March 20, 2006, the Department of Child Services (DCS) determined, by its Family Case Manager (FCM) LaTrece Thompson, the child is to be a child in need of services because the mother and sole legal custodian, Jessica Phelan, uses marijuana and cocaine and has failed to comply with services agreed upon through an [sic] Service Referral Agreement (SRA). The SRA was entered into in November of 2005 after the child tested positive for marijuana at birth. Ms. Phelan has admitted to FCM Thompson that she and the alleged father of her child, Michael Bennett, currently use cocaine and marijuana. In addition, Ms. Phelan has failed to complete and [sic] of the drug and alcohol services offered through the SRA, including random drug screening. Therefore, the child is endangered in her care and the family is in need of rehabilitative services.
  - B) Michael Bennett is the alleged father of the child. Mr. Bennett has not established paternity for the child, has not contacted MCDCS regarding the child's health, safety, or welfare, and has not demonstrated an ability or willingness to appropriately parent the child at this time.

Appellant's Appendix at 31-32.

On April 19, 2006, the trial court ordered that K.P. become a ward of the MCDCS. On May 25, 2006, the trial court held an initial hearing and indicated that DNA testing had occurred and the results indicated Father was K.P.'s father. On June 14, 2006, the trial court held a fact finding hearing for Mother and Father. On July 25, 2006, the trial court entered the following order:

The Court finds that the [MCDCS] has met its burden by a preponderance of the evidence, and the Court grants the Petition Alleging Children in Need of Services and makes the following findings of fact, conclusions of law, and judgment of entry.

#### FINDINGS OF FACT

The Court finds the following by a preponderance of the evidence:

1. All events in the petition occurred in Marion County, Indiana.
2. Jessica Phelan is the mother of [K.P.].
3. Michael Bennett is the alleged father of [K.P.].
4. [K.P.] was born on November 10, 2005, and is eight (8) months old.
5. Jessica Phelan entered into a Service Referral Agreement with DCS on December 13, 2005, as a result of [K.P.] being born marijuana positive.
6. As a part of that Service Referral Agreement, [Mother] agreed to participate in a substance abuse evaluation and to follow through with all recommendations made by the evaluator. She also agreed to submit to random drug screens, to refrain from using any form of illegal substances, and to ensure that neither she nor her children are exposed to illegal substances nor are in the presence of substance abusers.
7. On or about March 15, 2006, DCS received a report alleging that [Mother] and [Father] were smoking marijuana and cocaine.

8. LaTrece Thompson was the DCS case manager assigned to monitor the Service Referral Agreement, and as such was also the investigator assigned to investigate the March 2006 report, which led to this CHINS filing.
9. Ms. Thompson completed a thorough investigation into the allegations, which included interviewing [Mother] regarding the allegations of drug use by [Mother] and [Father]. She also attempted to interview [Father] regarding these allegations but was advised by [Mother] that [Father] was at work and was unable to speak with her.
10. [Mother] admitted to FCM Thompson that she had smoked cocaine with [Father] the evening of March 15, 2006.
11. [Mother] also admitted to FCM Thompson that she understood that she was involved in a Service Referral Agreement with DCS. She stated that she was aware that she was to attend drug treatment and urine screens at Community Addiction Services of Indiana (CASI) as a service requirement under the Service Referral Agreement. [Mother] admitted that she cancelled her appointments with CASI in January and February of 2006 and that she failed to attend again in March 2006 after FCM Thompson had sent over another referral to CASI.
12. DCS substantiated the allegations of neglect because [Mother] admitted to using cocaine and failing to follow through with the requirements of the Service Referral Agreement.
13. If any of the foregoing Findings of Fact should more properly be denominated as Conclusions of Law, then they are so determined.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter pursuant to Indiana Code 31-30-1-1(2) and Indiana Code 31-30-2-1.
2. All events in the Child In Need of Services petition and the CPS investigation occurred in Marion County, Indiana.

3. [K.P.] is a child in need of services as defined in IC 31-34-1 in that her physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal or neglect of her parent, guardian or custodian to provide her with necessary food, clothing, shelter, medical care, education or supervision.
4. [K.P.] is a child in need of services as defined in IC 31-34-1 in that the child was born with fetal alcohol syndrome or any amount; including a trace amount, of a controlled substance or a legend drug in the child's body.
5. [K.P.] is a child in need of services because [Mother] smoked marijuana while she was pregnant with [K.P.]; [K.P.] tested positive for marijuana at birth; [Mother] failed to follow through with services that she agreed to complete under a Service Referral Agreement as a result of [K.P.] being born marijuana positive; and she admitted to using cocaine with [Father] on March 15, 2006.
6. [K.P.] needs care, treatment or rehabilitation that she is not receiving and that is unlikely to be provided or accepted without the coercive intervention of the Court.
7. If any of the foregoing Conclusions of Law should more properly be denominated as Findings of Fact, then they are so denominated.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED**, by the Court that [K.P.] is a Child In Need of Services as to [Mother] and [Father].

Id. at 71-74.

On August 30, 2006, the trial court held a disposition hearing and entered the following dispositional order:

The Court finds that reasonable efforts have been offered and available to prevent or eliminate the need for removal from the home. After reviewing the reports and information from the Office of Family and Children, service providers and other sources, which the Court now incorporates into this order (see Court file), the Court also finds that the services offered and available have either not been effective or been

completed that would allow the return home of the child without Court intervention.

The Court finds that it is contrary to the health and welfare of the child to be returned home and that reasonable efforts have been made to finalize a permanency plan for the child[.]

The Court orders the child to be a ward of the Marion County Office Of Family and Children. The Court orders that the responsibility for placement and care of the child is ordered to the Marion County Office of Family and Children, with placement at: continued in Relative Care.

The Court proceeds to disposition and adopts the Pre-Dispositional Report of the Division of Family and Children and incorporates same as the findings of the Court, including plan of permanency which is hereby ordered. The Court also orders the Parental Participation, which is made a part of the order.

The Court now orders the child removed from the care of [Mother] and [Father] pursuant to this Dispositional Order.

The Plan for permanency: Reunification with parent(s)[.]

Id. at 18-19.

The sole issue is whether the evidence is sufficient to support the trial court's determination that K.P. is a CHINS with regard to Father. When we review the sufficiency of evidence, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. In re A.H., 751 N.E.2d 690, 695 (Ind. Ct. App. 2001), trans. denied. We neither reweigh the evidence nor reassess the credibility of the witnesses. Id. The MCDCS was required to prove by a preponderance of the evidence that K.P. was a CHINS. Id.

Ind. Code § 31-34-1-1 (Supp. 2005) governs the CHINS determination and provides:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
- (2) the child needs care, treatment, or rehabilitation that:
  - (A) the child is not receiving; and
  - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

When a court's orders contain specific findings of fact and conclusions of law, we engage in a two-tiered review. A.H., 751 N.E.2d at 694-695. First, we determine whether the evidence supports the findings. Id. at 695. Then, we determine whether the findings support the judgment. Id. Findings of fact are clearly erroneous when there is no substantial evidence of probative value to support the findings. Id. When deciding whether the findings are clearly erroneous, we consider only the evidence and reasonable inferences therefrom that support the judgment. Id. We cannot reassess the credibility of the witnesses or reweigh the evidence. Id. We only reverse the trial court's judgment if it is clearly erroneous. Id. A judgment is clearly erroneous if it is unsupported by the findings and conclusions. Id.

A. Findings of Fact



Father argues that the evidence does not support the following trial court's findings: (1) the finding that the case manager received a report alleging that Mother and Father were smoking marijuana and cocaine; (2) the finding of a thorough investigation; and (3) the finding of neglect. We will address each separately.

1. Finding of Allegation of Drug Use

Father argues that the evidence does not support the trial court's finding that "[o]n or about March 15, 2006, DCS received a report alleging that [Mother] and [Father] were smoking marijuana and cocaine." Appellant's Appendix at 72. Father argues that the contents of the report could not be used to support a factual determination because the testimony was admitted for the limited purpose of establishing why the case manager contacted Mother. Father also argues that the case manager never testified that the report stated that Mother and Father were smoking marijuana and cocaine.

Father references the following exchange, which occurred on direct examination of the case manager:

Q Ms. Thompson, what, did you get a report during the pendency of the service referral agreement, that caused you to do an investigation on this case?

A Yes.

Q What was the substance of the report? Why did you do your investigation?

[Mother's Attorney]: Judge, I'm gonna object on the grounds of hearsay on a report. She didn't go do it. The question was, did you get a report. So any testimony on that report is hearsay.

DCS: Your Honor, I'm not offering it for the truth of what was contained in the report, but just to show why the case manager initiated an investigation on the report.

THE COURT: All right. I'll allow it for that reason only. Any information that may suggest that there was any, any other facts involved in the case, the Court will not consider it.

DCS: Okay.

THE COURT: It's only considering that for the purpose of further investigation only.

DCS: I understand.

THE COURT: Okay.

Q So Ms. Thompson, why did you do an investigation on this report that you received?

A Due to the fact that Ms. Phelan had not completed any of the substance abuse evaluation, had not done any drug screens. The report that I received indicated there was possible drug usage, by Ms. Phelan. And I called Ms. Phelan.

Transcript at 30. The evidence supports the finding that the DCS received a report. Because the trial court stated that it was only considering the testimony for the purpose of further investigation only, we must conclude that the evidence does not support the finding that the DCS received a report alleging that Mother and Father were smoking marijuana and cocaine. We note that “[s]pecial findings, even if erroneous, do not warrant reversal if they amount to mere surplusage and add nothing to the trial court’s decision.” Wagner v. Spurlock, 803 N.E.2d 1174, 1179 (Ind. Ct. App. 2004).

2. Finding of a Thorough Investigation

Father also argues that the evidence does not support the trial court's following finding:

9. Ms. Thompson completed a thorough investigation into the allegations, which included interviewing [Mother] regarding the allegations of drug use by [Mother] and [Father]. She also attempted to interview [Father] regarding these allegations but was advised by [Mother] that [Father] was at work and was unable to speak with her.

Appellant's Appendix at 72. Specifically, Father challenges the finding that the case manager made a thorough investigation because the case manager did not attempt to interview Father. Our review of the record does not reveal that the case manager attempted to interview Father. The case manager called Mother and met with Mother regarding the allegations in the report. The case manager talked to Mother, and Mother admitted that she had used cocaine with Father. Whether the investigation was thorough was a matter for the trial court and we cannot reweigh the evidence on appeal. Thus, the finding that the case manager completed a thorough investigation is not clearly erroneous. See, e.g., Roark v. Roark, 551 N.E.2d 865, 871 (Ind. Ct. App. 1990) (holding that the trial court's finding was not clearly erroneous).

### 3. Finding of Neglect

Father argues that the evidence does not support the finding that the "DCS substantiated the allegations of neglect because [Mother] admitted to using cocaine and failing to follow through with the requirements of the Service Referral Agreement." Appellant's Appendix at 73. Father also argues that the Mother's "statement to [the case manager] is not even clear as to whether she was alleging that [Father] also used cocaine,

or whether [Mother] simply used cocaine in [Father]’s presence.” Appellant’s Brief at 19.

Mother admitted that she “used cocaine with [Father].” Transcript at 31. The following exchange occurred between Thompson, the case manager, and Father’s attorney:

Q Not only Ms. Phelan had used drugs, but she implicated a Mr. Bennett as having used drugs?

A Yes.

Q Okay. And that is the essence of why we’re here, correct?

A Yes.

Q Ms. Phelan told you she had used drugs, and she implicated Mr. Bennett as having used drugs?

A Yes.

Transcript at 40. Based on the record, we conclude that the evidence is sufficient to support the finding that Father used cocaine.

Father also argues that use of cocaine and failing to follow through with the requirements of the service referral agreement are insufficient to show neglect. Mother admitted that she had used cocaine with Father. The case manager expressed concern K.P.’s supervision because K.P. could be alone with a parent when they are using cocaine. Given the facts that K.P. was born with marijuana in her system and Father used cocaine with Mother while K.P. was in Mother’s care, we cannot say that the trial court’s finding is clearly erroneous. See White v. State, 547 N.E.2d 831, 836 (Ind. 1989)

(holding that “the knowing exposure of a dependent to an environment of illegal drug use poses an actual and appreciable danger to that dependent and thereby constitutes neglect regarding the endangerment requirement of the offense”).

B. Conclusions of Law

Father argues that the findings of fact do not support four of the trial court’s conclusions.

1. K.P. was Born with a Controlled Substance in Her Body

Father argues that the findings of fact and the evidence do not support the trial court’s following conclusion:

3. [K.P.] is a child in need of services as defined in IC 31-34-1 in that the child was born with fetal alcohol syndrome or any amount; including a trace amount, of a controlled substance or a legend drug in the child’s body.

Appellant’s Appendix at 74. Father concedes that “evidence was presented that [K.P] tested positive for marijuana at birth,” but argues that “the CHINS petition filed in this case did not allege [K.P.’s] status at birth as the reason for the CHINS.” Appellant’s Brief at 16. Father also argues that a CHINS finding may not be based upon a statutory provision and facts not alleged in the CHINS petition.

The CHINS petition stated, in part:

5. The children are Children In Need of Services as defined in IC 31-34-1 in that: one or more of the children’s physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of a parent, guardian or custodian to supply one or more of the children with necessary food, clothing, shelter, medical care, education or supervision; and the children need

care, treatment or rehabilitation that the children are not receiving and are unlikely to be provided or accepted without the coercive intervention of the Court, as shown by the following, to wit:

- A) On or about March 20, 2006, the Department of Child Services (DCS) determined, by its Family Case Manager (FCM) LaTrece Thompson, the child is to be a child in need of services because the mother and sole legal custodian, Jessica Phelan, uses marijuana and cocaine and has failed to comply with services agreed upon through an [sic] Service Referral Agreement (SRA). *The SRA was entered into in November of 2005 after the child tested positive for marijuana at birth.* Ms. Phelan has admitted to FCM Thompson that she and the alleged father of her child, Michael Bennett, currently use cocaine and marijuana. In addition, Ms. Phelan has failed to complete and [sic] of the drug and alcohol services offered through the SRA, including random drug screening. Therefore, the child is endangered in her care and the family is in need of rehabilitative services.

Appellant's Appendix at 31-32 (emphasis added). While the fact that K.P. tested positive for marijuana at birth was alleged in the CHINS petition, the petition did not allege that K.P. was a CHINS under Ind. Code § 31-34-1-10.<sup>2</sup> Allegations were made under Ind.

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<sup>2</sup> Ind. Code § 31-34-1-10 (2004) provides:

Except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

(1) the child is born with:

- (A) fetal alcohol syndrome; or
- (B) any amount, including a trace amount, of a controlled substance or a legend drug in the child's body; and

(2) the child needs care, treatment, or rehabilitation that:

- (A) the child is not receiving; or
- (B) is unlikely to be provided or accepted without the coercive intervention

Code § 31-34-1-1. The trial court could find that K.P. was born with marijuana in her system, but could not base CHINS on Ind. Code § 31-34-1-10. See Maybaum v. Putnam County Office of Family & Children, 723 N.E.2d 951, 956 (Ind. Ct. App. 2000) (holding that “to permit the trial court to base its decision upon a theory not set forth by the OFC would contravene the purpose of the CHINS statutes, which specifically require the OFC to provide a citation to the precise section of the CHINS statute and the specific facts underlying the allegation”).

2. Mother Smoked Marijuana While She Was Pregnant

Father argues that the findings of fact and the evidence do not support the trial court’s following conclusion:

4. [K.P.] is a child in need of services because [Mother] smoked marijuana while she was pregnant with [K.P.]; [K.P.] tested positive for marijuana at birth; [Mother] failed to follow through with services that she agreed to complete under a Service Referral Agreement as a result of [K.P.] being born marijuana positive; and she admitted to using cocaine with [Father] on March 15, 2006.

Appellant’s Appendix at 74. Father argues that the CHINS petition did not include allegations that Mother smoked marijuana while she was pregnant with K.P. and that K.P. tested positive for marijuana at birth. Because we have already concluded that the CHINS petition alleged that K.P. was born positive for marijuana, see supra Part A., we cannot say that the trial court erred.

3. Need for Supervision

Father argues that the findings of fact and the evidence do not support the trial court's following conclusions:

5. [K.P.] is a child in need of services as defined in IC 31-34-1 in that her physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal or neglect of her parent, guardian or custodian to provide her with necessary food, clothing, shelter, medical care, education or supervision.
6. [K.P.] needs care, treatment or rehabilitation that she is not receiving and that is unlikely to be provided or accepted without the coercive intervention of the Court.

Appellant's Appendix at 74.

Father argues that "a failure to follow through with services was not shown to have any negative effect, or potential negative effect on [K.P.]" and that there was no evidence that either Mother or Father used drugs while responsible for K.P.'s care. Appellant's Brief at 17. Although the case manager admitted that there was ample food, clothing, and shelter, she also expressed concern regarding Father's ability to parent K.P. because he had not established paternity at the time of the CHINS petition, Father's use of cocaine, and K.P.'s supervision because K.P. could be alone with a parent when they are using cocaine. The case manager was not sure that Father actually lived in the home. Father was never there when the case manager visited the house. K.P. was born with marijuana in her system and Father used cocaine with Mother while K.P. was in Mother's care. Under the circumstances, we cannot say that the trial court's finding is clearly erroneous. The evidence is sufficient to demonstrate that K.P.'s "physical or mental condition" is "seriously endangered," that K.P. needed "care, treatment, or rehabilitation"



that K.P. was not receiving and was “unlikely to be provided . . . without the coercive intervention of the court.” See, e.g., Parker v. Monroe County Dept. of Public Welfare, 533 N.E.2d 177, 179 (Ind. Ct. App. 1989) (holding that the court does not have to wait until a tragedy occurs in order to take action and that the evidence was sufficient to support the finding that children were in need of services).

4. CHINS as to Father

Lastly, Father argues that the evidence regarding K.P. being a CHINS in relation to Father is “almost non-existent” and cites Bester v. Lake County Office of Family & Children, 839 N.E.2d 143 (Ind. 2005), for the proposition that Father’s rights and his status as K.P.’s father were a mere afterthought. Appellant’s Brief at 18. We find Bester distinguishable because the father in Bester was appealing from a termination and not from a CHINS determination. Further, unlike in Bester in which the father testified that he had not used illegal drugs since the birth of his son and the trial court made no finding that the father had used drugs recently, here the record reveals that Father used cocaine with Mother while K.P. was in Mother’s care. 839 N.E.2d at 152.

For the foregoing reasons, we affirm the trial court’s determination that K.P. is a CHINS.

Affirmed.

MAY, J. and BAILEY, J. concur